COMMONWEALTH OF KENTUCKY
SUPREME COURT OF KENTUCKY
SUPREME COURT CASE NO. 2015-SC-000018-CL

COMMONWEALTH OF KENTUCKY — APPELLANT

vs.

APPEAL FROM THE JEFFERSON CIRCUIT COURT
CASE NO. 13CR2070-003
DIVISION 6, JUDGE OLU A. STEVENS

JAMES DOSS — APPELLEE

BRIEF OF *AMICUS CURIAE* NATIONAL BAR ASSOCIATION and NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE IN SUPPORT OF APPELLEE

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CERTIFICATION OF SERVICE

Undersigned does hereby certify that copies of this brief were served upon the following named individuals by mail or delivery on January 6, 2016 to: Honorable Olu A. Stevens, Judge, Jefferson Circuit, Div. 6, Louisville, KY 40202; Hon. Cicely Jaracz Lambert, Counsel for Appellee, Office of the Louisville Metro Public Defender, Advocacy Plaza, 717-719 W. Jefferson St., Louisville, KY 40202; and Hon. Dorislee Gilbert, Counsel for Appellant, Special Assistant Attorney General, Office of the Commonwealth's Attorney, 514 West Liberty St., Louisville, KY 40202. The record on appeal was not withdrawn by Amici Curiae.

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INTRODUCTION

Pursuant to CR 76.12(4)(e), amici curiae National Bar Association ("NBA") and the National Association for the Advancement of Colored People ("NAACP") state that the purpose of this Amicus Brief is to aid the Court in its review of some of the certified issues raised by the Commonwealth. The particular issue addressed in this Amicus Brief concerns the scope of a trial court's discretion when the Commonwealth provides a criminal defendant with a jury panel that grossly underrepresents minorities such that the jury panel fails to represent a fair cross-section of the community, and as a result, the criminal defendant is deprived of a fair possibility of drawing his jury from a cross-section of the community.

The Commonwealth seeks to have this Court prohibit trial courts from exercising any discretion to discharge a jury panel even when it is patently clear that the jury panel's initial composition did not constitute a fair cross-section of the community as required under the Sixth Amendment of the U.S. Constitution. The Commonwealth's position threatens the liberty interests of minority criminal defendants, and unnecessarily seeks to interfere with a trial court's discretionary power to protect the fairness and impartiality of the jury selection process.

STATEMENT OF POINTS AND AUTHORITIES

ARGUMENT

ARGUMENT

I. THE FAIR CROSS-SECTION OF THE COMMUNITY REQUIREMENT IS THE KEY MECHANISM FOR INSURING THE IMPARTIALITY OF THE JURY, WHICH WARRANTS PROTECTION IRRESPECTIVE OF SYSTEMATIC EXCLUSION

A. There is a Long History of Prosecutors Purposefully Seeking to Remove Minority Jurors from Jury Panels

In this case, the Commonwealth characterizes its concern in seeking review as solely being for the protection of the rights of the Commonwealth and jurors, and it has gone as far as claiming that it is actually trying to prevent racial discrimination in seeking to prohibit trial courts from discharging jury panels that plainly lack diversity. Such assertions ring hollow. Indeed, the Commonwealth seems highly concerned with ensuring that, when a patently non-diverse and pre-dominantly all-white jury panel is sent to a judge, the trial judge has no discretion to discharge that panel when the criminal defendant is a minority. Yet, the Commonwealth is wholly unconcerned that, in order to get such a jury panel, it necessarily means that other minority jurors who normally would be represented on the jury panel were disproportionally excluded. If the concern is for the rights of jurors, then that concern should apply to ALL jurors, and the Commonwealth should join the trial court in attempting to ensure that all jury panels represent a fair cross-section of the community. The Commonwealth does not share the trial court's concern, and the reason for that seems clear.

There is a long history in Jefferson County, as well as the country as a whole, of prosecutors seeking to keep minorities from sitting on petit juries based on the prosecutors' recognition that removing such jurors improves the prosecutors'

chances for obtaining a conviction. *See generally Batson v. Kentucky*, 476 U.S. 79 (1986) (holding that Jefferson County prosecutor had to provide race-neutral reasons for striking blacks from the jury venire summoned for petitioner's trial).

Indeed, in 2010, the Equal Justice Initiative ("EJI") issued a comprehensive report outlining some of the continued efforts by prosecutors to exclude minorities from petit juries. *See* Equal Justice Initiative, *Illegal Racial Discrimination in Jury Selection: A Continuing Legacy*, Equal Justice Initiative, August 2010, http://www.eji.org/raceandpoverty/juryselection (then follow "EJI Report hyperlink under "Learning More"). The EJI report examined over eight different states and their current jury selection process and found that, since the Supreme Court's decision in *Batson v. Kentucky*, 476 U.S. 79 (1986), prosecutors have continued to disproportionately exclude large numbers of Africa-Americans and other minorities from jury panels using mechanisms, such as peremptory challenges. *Id.* at 4-5. The practice is so prevalent that in some counties prosecutors have stricken up to 80% of the African-Americans qualified for jury service in death cases. *Id.* at 5, 14. The EJI report also found that some prosecutors are actually trained to exclude people on the basis of race and are instructed on how to conceal their racial basis. *Id.* at 4, 20.

There can be no question that prosecutors continue to use every method possible to exclude minorities from petit juries, and given that fact, the Commonwealth's motivation here becomes rather clear. If by happenstance or purposeful discrimination, a jury panel is selected that *grossly* underrepresents minorities, the Commonwealth wishes to have this Court cut-off any discretion the

trial court has to correct that situation to the detriment of the criminal defendant.

The danger in the Commonwealth's position is that, while ideally one would hope that the exclusion of minorities has no impact on the outcome of the trial, the unfortunate reality is the exclusion of minorities from jury panels significantly impacts conviction rates for minority criminal defendants. There have been numerous studies conducted showing that minority defendants are more likely to be convicted by an all-white jury than white defendants.

Indeed, less than three years ago, the Quarterly Journal of Economics ("QJE") published an article examining the effect of jury selection and racial composition on trial outcomes from felony trials in two Florida counties between 2000 and 2010. *See* Shamena Anwar et al, *The Impact of Jury Race in Criminal Trials*, Q. J. of Econ. (2012) 127, 1017 (http://qje.oxfordjournals.org/content/127/2/1017.full.pdf+html). The study found evidence that juries formed from all-white jury pools convicted African-American defendants sixteen (16) percentage points more often than white defendants. Moreover, ***the study found that this gap in conviction rates is entirely eliminated when the jury includes at least one African-American member***. *Id.* at 1017. Indeed, even with only one black member on the jury, conviction rates were almost identical (71% for blacks and 73% for whites). *Id.*

The study noted that a reason for this normalization of conviction rates when a mixed jury deliberates may stem from the fact that "racially mixed [] juries, compared to all-white juries, tended to deliberate longer, discuss more case facts, raise more questions about what was missing from the trials, and be more likely to discuss race issues, such as profiling, during deliberations." *Id.* at 1040-41

(*referencing* Samuel Sommers, *The Effects of Race Salience and Racial Composition on Individual and Group Decision-Making*, PhD diss., University of Michigan, 2002). Of note, the QJE article found that, even when African-Americans do not make it to the petit jury, their presence on the jury panel during the selection process still has some potential impact on the way the attorneys present the case, and the way other jurors may view the case. *Id.* at 1041.

The above research shows that a diverse jury leads to a more fair and impartial trial that is less influenced by either hidden racism or unintentional subconscious bias. Conversely, when a minority defendant is tried by an all-white jury, he is significantly more likely to be convicted than his white counterpart. These facts cannot be ignored because we cannot solve the problem of inequality in the judicial process without first being willing to recognize that racism and bias exists in our society and impacts the fairness of that process. It is important this Court fully understands the true goals the Commonwealth is seeking to accomplish in asking this Court to rule on the issues certified and the disparate impact such decisions will have on minority criminal defendants.

B. The Fair Cross-Section of the Community Requirement

One of the fundamental tenets of the jury system is the criminal defendant's right to draw his jury from a fair cross-section of the community. *See Taylor v. Louisiana*, 419 U.S. 522, 528 (1975) ("[T]he selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial."). This right stems from the Sixth Amendment of the U.S. Constitution, which provides in pertinent part: "In all criminal prosecutions, the

accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed . . . ." As the Supreme Court explained in *Holland v. Illinois*, the fair cross-section requirement is "not explicit in the text" of the Sixth Amendment, "but is derived from the traditional understanding of how an impartial jury is assembled. That traditional understanding includes a representative venire, so that the jury will be . . . 'drawn *from* a fair cross section of the community.'" 493 U.S. 474, 480 (1990) (quoting *Taylor*, 419 U.S. at 527 (1975)) (emphasis in original).

What is critical is that a criminal defendant must have a "fair possibility" of selecting a representative jury from a fair cross-section of the community. *See Taylor*, 419 U.S. at 528-29. While the defendant does not have a right to a petit jury made up of members from his own race, the defendant does have a right to have his petit jury selected from a jury panel that represents a fair cross-section of the community. *See Holland v. Illinois*, 493 U.S. at 478-79; *see also Taylor*, 419 U.S. at 526-31.

Once the jury panel consists of a fair cross-section of the community, courts have established procedures to safeguard against intentional racial discrimination. In *Batson v. Kentucky*, which originated in Jefferson County, the United State Supreme Court held that, upon objection, attorneys must provide a race-neutral basis for exercising peremptory challenges when a defendant is a member of a distinct group and the prosecutor seeks to strike a juror of the same group. 476 U.S. 79, 90 (1986). While many question the effectiveness of the protections afforded under *Batson*, those protections can have no effect if the Commonwealth fails to provide a jury panel consisting of a fair cross-section of the community in the first instance.

C. The Trial Court Properly Recognized James Doss's Right to a Fair Cross-Section of the Community Was Infringed, Even Without A Showing of Systematic Exclusion

The Commonwealth spends much of its brief addressing the test for a *prima facie* showing of a violation of the fair cross-section requirement as established by the United States Supreme Court and this Court. The test expressed in *Duren v. Missouri*, 439 U.S. 357, 364 (1979), is that, in order to establish a *prima facie* violation of the fair-cross-section requirement, the defendant must show: (1) the group alleged to be excluded is a distinctive group in the community; (2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) this underrepresentation is due to systematic exclusion of the group in the jury-selection process.

The Commonwealth's primary contention is that Defendant Doss failed to establish that the underrepresentation of his jury panel was due to systematic exclusion. While the Commonwealth failed to present evidence before the trial court establishing that its process was free of systematic exclusions, even assuming that was the case, ***the right to a fair cross-section of the community cannot solely be based on a requirement of systematic exclusion***. Indeed, such a conclusion defies logic.

If, as the U.S. Supreme Court has recognized, it is fundamental to the selection of an impartial jury that a petit jury be selected from a jury panel that represents a fair cross-section of the community, *see Taylor*, 419 U.S. at 528-29, the failure of the Commonwealth to provide a jury panel that represents a fair cross-section violates that right regardless of whether such a deficiency was due to insidious discriminatory

practices or through happenstance based on a random procedure adopted by the Commonwealth. ***The result from the perspective of the criminal defendant is the same.*** In either case, the criminal defendant, whose liberty interests are placed at risk by the Commonwealth, is forced to select his petit jury from a jury panel that provides him with no fair possibility of seating a diverse jury panel, which morality and statistical analysis show is necessary for the defendant to have a truly fair trial.

By this argument, the NBA and NAACP are not asserting that a trial court is *required* to discharge a jury panel if there is a showing of gross underrepresentation but no showing of systematic exclusion. Rather, our position is that the mere fact the discharge of the jury panel is not constitutionally mandated without a showing of systematic exclusion does not mean that the right to a fair cross-section of the community does not exist without a showing of systematic exclusion. The right does still exist, and the trial court should be allowed discretion to discharge the jury panel if the circumstances warrant such relief.

By way of example, if a party asked for a continuance and the trial judge determined that the circumstances did not constitutionally require the granting of a continuance in order to protect any due process concerns, this does not mean that the trial court could not nonetheless grant a continuance, and it does not mean that the trial court would abuse its discretion if it decided to do so. The issue is not whether the trial court here was *required* to discharge this jury, the issue is whether the trial court had the discretion to do so in the interest of fairness.

II. THE COMMONWEALTH MISCHARATERIZES THE BASIS OF THE TRIAL COURT'S RULING, WHICH WAS BASED ON A RECOGNITION THAT THE JURY PANEL DID NOT CONSTITUTE A FAIR CROSS-SECTION OF THE COMMUNITY

Before we examine whether the actions of the trial court constituted an abuse of discretion, it is important to clarify that the issue here is NOT whether an African-American criminal defendant has a right to an African-American on his or her petit jury. That is not the NBA's and NAACP's particular concern, and we do not believe that was the trial court's particular concern. In its brief, the Commonwealth makes a great effort to characterize the issue as whether the trial court can discharge a petit jury because no African-Americans were seated on the jury. However, the Commonwealth misconstrues or misapprehends the underlying basis for the trial court's ruling.

Simply stated, the Commonwealth provided James Doss with a jury panel that wholly and grossly failed to represent a fair cross-section of the community. Both the trial judge and the Commonwealth acknowledged that the jury panel was materially inconsistent with the usual jury panel composition. Indeed, the Commonwealth relies on this fact as a basis for its argument that there was no showing of systematic exclusion of African-Americans, because this particular jury panel was an anomaly. While such reasoning by the Commonwealth is flawed, the Commonwealth misses the larger issue.

In this case, James Doss did not have an opportunity to select his jury from a pool of jurors that were a fair cross-section of the community. This was the trial court's primary concern, which the trial court expressed on a number of occasions. Now it appears the trial court concluded that, since there was one African-American on the jury panel, it would not immediately strike the panel based on a hope that the defect in the jury panel could be effectively remedied if the one African-American

juror made it to the petit jury. However, after that juror was stricken and the defendant renewed his objection, the trial court concluded that the unfairness of the process had not been remedied and that justice, even if not mandated, still warranted the striking of the jury panel.

It is an over-simplification for the Commonwealth to argue that the trial court struck the jury panel because there was no African-Americans on the petit jury. Rather, the trial court struck the jury panel because the jury panel, as initially provided by the Commonwealth, failed to represent a fair cross-section of the community, and that initial defect was not later remedied. Again, the issue is not whether an African-American sits on the petit jury. Rather, the issue is whether the jury panel starts from an initial point of being a fair cross-section of the community.

Here, the Commonwealth is attempting to eliminate a trial court's ability to discharge a jury panel if it determines that the jury panel *grossly* fails to represent a fair cross-section of the community. That is what is at issue here, notwithstanding the phrasing the Commonwealth has used in its certified issues.

III. THE COMMONWEALTH MISCONTRUES ITS OWN RIGHT AND THE RIGHTS OF INDIVIDUAL JURORS REGARDING JURY SELECTION AS SAID RIGHTS RELATE TO THE PARTICIPATION IN THE PROCESS IN GENERAL AND TO PURPOSEFUL DISCRIMINATION INTENDED TO EXCLUDE A GROUP FROM JURY PARTICIPATION BASED ON RACE

In this case, the trial court did nothing more than exercise its discretion and order that a new jury panel be seated. The Commonwealth seeks to prohibit trial courts from exercising such discretion by arguing that it has a right to demand the case proceed on the initial jury panel and individual jurors have a right to not be excluded from jury participation. The Commonwealth misapprehends the rights it is

asserting.

As to individual jurors, it is clear that an "an individual juror does not have a right to sit on any particular petit jury . . . ." *George v. McCollum*, 505 U.S. 42, 48 (1992). Jurors do possess a right to not be excluded from jury participation based solely on race. *Id.* at 48. However, the basis of that right is wholly distinguishable from the facts here.

Courts have recognized that it is improper for attorneys to exclude a juror on the basis of race. *See, e.g., Batson*, 476 U.S. 79 (holding Jefferson County prosecutor had to provide race-neutral reasons for striking blacks from the jury venire summoned for petitioner's trial). However, the underlying concern is that, if a prosecutor prohibits a juror from participating on the petit jury on the basis of race, such acts perpetually and systematically deny that juror the right to participate in the jury process, as the prosecutor would use race to continually strike that juror in future cases. *See generally Powers v. Ohio*, 499 U.S. 400, 409 (1991) (recognizing that striking a juror on the basis of race forecloses, as to that juror, "a significant opportunity to participate in civic life."). The juror has a right to not be subjected to that type of individualized exclusion.

In this case, the trial court did not strike or exclude any particular juror. The trial court discharged the entire jury panel, and the basis for that decision was not because of the race of any particular juror, but because the jury panel, as initially provided by the Commonwealth, failed to afford the criminal defendant the opportunity to select his petit jury from a pool that was a fair cross-section of the community. No particular juror was denied an opportunity to participate in the jury

process, and ***in fact, some of the same jurors were called back to the juror panel the following day***. VR 11/19/2014, 09:50:26.

The Commonwealth is essentially comparing apples to oranges in trying to use cases prohibiting the peremptory strikes of an individual juror on the basis of race as a justification for prohibiting the discharge of a jury panel due to its initial failure to represent a fair cross-section of the community. This Court should reject the Commonwealth's reasoning on this point.

It should also be mentioned that the Sixth Amendment is primarily concerned with the rights of the criminal defendant. *See Berghuis v. Smith*, 559 U.S. 314, 319 (2010)("The Sixth Amendment secures to criminal defendants the right to be tried by an impartial jury . . . "). Indeed, only the criminal defendant is at risk of losing his liberty interest. Thus, there must be some common sense and balancing of interest that should be considered on this issue. Even if the Commonwealth were correct in its interpretation as to individual jurors' rights, which it is not, such rights still must give way to the liberty interests of the criminal defendant who has a right to draw his petit jury from a jury panel that represents a fair cross-section of the community.

As to the Commonwealth, it makes the conclusory argument that it had a right to proceed with a duly selected jury in the absence of prima facie evidence of a violation of the fair-cross-section requirement. First, it should be emphasized that, there is no question that the jury panel at issue here was not representative of a fair cross-section of the community (and the Commonwealth did not put any evidence in the record showing otherwise). Thus, what the Commonwealth is really asserting is that, even when a jury panel *grossly* fails to represent a fair cross-section of the

community, it has a right to subject the criminal defendant to a petit jury selected from such a panel. The Commonwealth cites no basis for this alleged right.

While the Commonwealth has a right to a jury, it does not have a right to any particular jury panel. And, the NBA and NAACP fail to see how the Commonwealth could assert that it has a right to a jury panel that failed to represent a fair cross-section of the community, when the Commonwealth is charged with ensuring that criminal defendants obtain jury panels that are a fair cross-section of the community.

Lastly, the Commonwealth's arguments regarding any burden the trial judge's actions might create are spurious at best. The Commonwealth provides nothing more than its own unsubstantiated conclusions that the trial court's actions will cause problems. Jury panels are discharged for all sorts of reasons, and the court system handles those discharges without any complications. This Court need only look at the facts in this case which show that a representative jury panel was able to be selected with little difficulty. If the Commonwealth's jury selection process is as unbiased and evenly distributed as it asserts, then instances in which a jury panel is *grossly* underrepresented would be infrequent. Thus, allowing a trial court this discretion in those rare cases will not have any significant impact.

IV. THE COMMONWEALTH HAS FAILED TO ESTABLISH THAT THE TRIAL COURT ABUSED ITS DISCRETION IN THIS CASE

It is well established that a trial court has broad discretion during the jury selection process to ensure that the process is fair and impartial. *See Brown v. Commonwealth*, 313 S.W.3d 577, 596 (Ky. 2010) ("[T]he trial court is vested with broad discretion to oversee the entire [jury selection] process, from summoning the venire to choosing the petit jury which actually bears and decides the case."). "The

test for an abuse of discretion is whether the trial judge's decision was arbitrary, unreasonable, unfair, or unsupported by sound legal principles." *Goodyear Tire & Rubber Co. v. Thompson*, 11 S.W.3d 575, 581 (Ky.2000). The Commonwealth cannot demonstrate an abuse of discretion here.

That James Doss was African-American is without question. Of the forty-one jurors on the original panel, that only one was African-American, representing 2.4% of the jury panel, also is without question. The U.S. census data for Jefferson County for 2014, indicates that the African-American population in the County is 21.5% of the total population. *See* U.S. Census Bureau, Jefferson County, Kentucky 2014 statistics *available at* http://quickfacts.census.gov/qfd/states/21/21111.html. Thus, under any method one could use to determine racial disparity, the jury panel that Defendant Doss was given *grossly* underrepresented African-Americans. Certainly, the Commonwealth did not present the trial court with any evidence that the jury panel was not *grossly* underrepresented, and in fact, the Commonwealth agreed that the composition of this jury panel was "unusual." VR 11/18/2014, 01:27:37 and following. Thus, as the trial court concluded, based on his own experience, this particular jury panel was not a fair cross-section of the community at large.

The above facts are established. Moreover, it is clear the trial court exercised its discretion reluctantly and only because the jury panel in this particular case was far outside the parameters of a normal jury panel. The trial court did nothing more than discharge the jury and call another jury panel. *This second panel was randomly selected*, and thus, the trial court in no way involved itself in the composition of the

second panel. The trial court's actions were not *sua sponte*, but rather were the result of a motion from the criminal defendant who plainly had a compelling liberty interest at stake in the matter. Under these circumstances, there can be no claim that the trial court's actions were arbitrary or unreasonable. The Commonwealth cannot satisfy its burden of showing an abuse of discretion here.

CONCLUSION

Trial judges are charged with the important role of ensuring that criminal trials are fair and the criminal defendant is given a fair and impartial jury. Trial judges are granted wide discretion to accomplish that task. The trial court here did nothing more than recognize that the jury panel provided by the Commonwealth was not a fair cross-section of the community, and based on a request from the defendant, the trial court discharged that panel and called for a new jury panel. There is nothing unreasonable or arbitrary about the trial court's actions, which are consistent with the goals of the Sixth Amendment of the United States Constitution. This Court should maintain trial courts' discretion to discharge jury panels in extreme cases when the composition of the panel plainly and grossly fails to represent a fair cross-section of the community. This ensures both the integrity and the appearance of fairness in the judicial process, which will only improve the public's perception of the justice system.

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